

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

ROMEO PLANK INVESTORS, LLC, a  
Michigan corporation,

Plaintiff,

vs.

Case No. 2005-5003-CH

PHYLLIS SHARBO, Macomb Township  
Assessor, and JOHN BRENNAN, Macomb  
Township Supervisor,

Defendant.

---

OPINION AND ORDER

Plaintiff has filed a motion for partial summary disposition on its claim of mandamus. Defendant, in response, has filed an emergency motion to stay proceedings, pursuant to MCR 7.209.

This matter involves property located east of Romeo Plank and north of 23 Mile Road. Plaintiff seeks to combine parcels of land that front on Romeo Plank with a parcel of land that fronts on 23 Mile Road into one large parcel. This combination implicates the Macomb Township's Land Division Ordinance, §17-161, *et seq.* ("township ordinance"), and the Land Division Act, MCL 560.101, *et seq.* ("LDA"). A series of transactions were necessary to comply with the requirements of the LDA and township ordinance. In September 2004, plaintiff submitted an application to defendants for approval of the first transaction. Defendants denied plaintiff's application and plaintiff appealed to the Macomb Township Zoning Board of Appeals ("ZBA"). The ZBA denied plaintiff's request and this Court reversed its decision in *Romeo Plank Investors v Macomb Township*, Case No. 2004-4813-AV, Opinion and Order dated July



25, 2005. An application for leave to appeal is pending at the Court of Appeals, Docket No. 266415. In August 2005, plaintiff again attempted to transfer portions of another Romeo Plank parcel to the 23 Mile Road parcel and on November 1, 2005 defendants denied its application. Plaintiff has now petitioned this Court for mandamus pursuant to MCR 3.305. Defendants have motioned to stay proceedings pending the outcome of *Romeo Plank Investors v Macomb Township*, Court of Appeals, Docket No. 266415.

The Court will begin its review with plaintiff's claim for mandamus. Plaintiff argues defendants lacked discretion to deny, without explanation, its application to transfer property. Plaintiff asserts the LDA regulates transfers of property between adjacent parcels. Plaintiff admits the township ordinance requires approval for such transaction, but claims it is unenforceable since it conflicts with the LDA. Even if the LDA and township ordinance regulated the transfer, plaintiff contends the transaction conformed to the requirements. Plaintiff concludes defendants were required to approve the transaction and a writ of mandamus is an appropriate remedy.

Defendants respond they had a legal duty to deny the application because it did not meet the applicable requirements under the ordinances. According to defendants, explanation for the denial was provided to plaintiff. Defendants contend the LDA does not preclude local ordinances from adopting more stringent requirements for land division. They urge a writ of mandamus is not appropriate since their action, as township assessor, requires discretion not ministerial tasks. In addition, defendants argue other remedies exist for plaintiff. As a result, defendants claim a writ of mandamus is not appropriate.

"The primary purpose of a writ of mandamus is to enforce duties created by law." *State Bd of Ed v Houghton Lake Community Schools*, 430 Mich 658, 667; 425 NW2d 80 (1988). A

writ of mandamus is an extraordinary remedy and the plaintiff has the burden to show entitlement. *White-Bey v Department of Corrections*, 239 Mich App 221, 223; 608 NW2d 833 (1999). In order to obtain a writ of mandamus, a plaintiff must establish "(1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy." *Id.* at 223-224.

The Court will turn its focus to the issue of whether plaintiff has no other adequate legal or equitable remedy, as the Court believes that issue is dispositive of plaintiff's claim for a writ of mandamus. Here, the record shows plaintiff immediately filed a claim for mandamus in this Court after denial of its application to transfer property by defendants. According to MCL 24.301, a person must exhaust all administrative remedies within an agency, until a final decision, before the decision is subject to direct review by the courts. Plaintiff has failed to demonstrate the exhaustion requirement is unnecessary because an appeal would be futile. *Manor House Apt v Warren*, 204 Mich App 603, 605; 516 NW2d 530 (1994). Plaintiff's appropriate legal remedy would be to appeal defendants' decision to the ZBA, pursuant to MCL 125.293. Additionally, plaintiff or defendants could appeal the ZBA decision to this Court. MCL 125.293a.

Moreover, the Court notes plaintiff has also requested monetary damages in its complaint which are alleged to have resulted from defendants' violations of its Constitutional rights. 42 USC §1983. A writ of mandamus is inappropriate if other remedies exist. *Radecki v Director of Worker's Disability Compensation*, 208 Mich App 19, 22; 526 NW2d 611 (1994). Given that plaintiff has legal and equitable remedies available, a writ of mandamus is not appropriate.<sup>1</sup>

---

<sup>1</sup> Based upon the Court's conclusion, it is unnecessary to address plaintiff's remaining arguments pertaining to its claim of mandamus.

This brings the Court to consider defendants' emergency motion to stay proceedings. In this motion, defendants argue a stay of proceedings is necessary for judicial economy and conformity due to the pending action *Romeo Plank Investors, LLC v Macomb Township*, Court of Appeals, Docket No. 266414. Defendants contend plaintiff's complaint is based on this matter before the Court of Appeals and the outcome may determine these proceedings. Further, defendants assert a stay of proceedings will not prejudice any party.

In response, plaintiff argues that a stay of proceedings will impose great costs to its business, including, the indefinite delay of pending closing dates, rescission of contracts, and forfeiture of deposits. In addition, plaintiff asserts a stay is not necessary for defendants' litigation goals.

MCR 7.209(E) provides a trial court may order a stay of proceedings, with or without a bond, as justice requires. An appeal does not stay the effect of a trial court's order unless the trial court or the Court of Appeals orders a stay. MCR 7.209(A)(1); *Bass v Combs*, 238 Mich App 16, 24; 604 NW2d 727 (1999). In proceedings involving governmental entities, a bond may not be required in order to stay proceedings. MCR 2.614(E).

The Court recognizes plaintiff's claims are closely related to *Romeo Plank Investors, LLC v Macomb Township*, Court of Appeals, Docket No. 266414. However, an appeal does not automatically stay the enforceability of the trial court's order unless the trial court or Court of Appeals orders such relief. MCR 7.209(A)(1). In this case, neither this Court nor the Court of Appeals has ordered such relief.

In addition, plaintiff presented evidence that it would incur business losses if a motion to stay proceedings was granted. Plaintiff's land purchase agreement for the transactions requires the closing to occur by November 1, 2006. See Exhibit 2 of Plaintiff's brief in response to

emergency motion to stay proceedings. If the closing does not occur by that date, plaintiff could lose its deposits in the amount of \$110,000. Plaintiff indicates it already invested \$312,805.67 in the project. See Exhibit 3 of Plaintiff's brief in response to emergency motion to stay proceedings. Defendants' interests are protected without granting a motion to stay proceedings. Defendants oppose, as indicated by their application for leave to appeal, the continuation of the nonconforming use of the property, not the reconfiguration of the parcels. See Exhibit 4 of Plaintiff's brief in response to emergency motion to stay proceedings. If the Court of Appeals rules against plaintiff, then defendants could enforce the zoning ordinance and impose the conforming use. Further, the Court is prohibited from requiring defendant's to post a bond to protect plaintiff's interest. MCR 2.614(E). The record shows that a stay of proceedings would leave plaintiff's interests unprotected, while defendants' interests would be unaltered. Therefore, justice does not require a stay of proceedings.

For the reasons set forth above, plaintiff's motion for partial summary disposition is DENIED and defendant's emergency motion to stay proceedings is DENIED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

\_\_\_\_\_  
Diane M. Druzinski, Circuit Court Judge

Date:

JUN 29 2006

DMD/aac

cc: R. Edward Boucher, Attorney at Law  
Peter W. Peacock, Attorney at Law

DIANE M. DRUZINSKI  
CIRCUIT JUDGE  
JUN 29 2006  
A TRUE COPY  
CARMELLA SABAUGH, COUNTY CLERK  
BY: ACW Court Clerk